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No. 317

IN THE

Supreme Court of the United States

No. 18557 (In U. S. Court of Appeals, Fifth Circuit)

HARDWARE MUTUAL CASUALTY COMPANY,
Petitioner
v.
ADAM McINTYRE, *Respondent*

Brief in Opposition to Petition for Writ of Certiorari

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No. 317

IN THE

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HARDWARE MUTUAL CASUALTY COMPANY,
Petitioner

v.

ADAM McINTYRE, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

Opinions Below

The opinion and judgment in the Fifth Circuit is not yet in the reports. It is attached as Appendix A, *infra*.

Jurisdiction

The judgment of the Appeals Court was entered on June 20, 1962 (Appendix A). No motion for rehearing was filed. The petition for a writ of certiorari was filed on the

10th day of August, 1962. The jurisdiction of this court is invoked under 28 U. S. C. A. § 1254 (1).

Questions Presented

1. Is the decision of the majority in conflict with the rule for determining jurisdiction as to the amount in controversy as laid down in *Horton v. Liberty Mutual Insurance Company*, 6 L. Ed. 2d. 890, 367 U. S. 348, by this Court as claimed by the dissenters, Judge Rives and Judge Hutcheson?

2. In diversity actions, is the amount in controversy in a Federal District Court determined by the good faith allegations of the complaint, or by the amount of the claimant's counterclaim?

Statutes Invoked

28 U. S. C. A. § 1332 in part:

> "§ 1332. Diversity of Citizenship; amount in controversy; costs.
>
> "(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum of $10,000.00, exclusive of interest and costs, and is between—
>
> "(1) Citizens of different states;"

Texas Civil Statutes, Vernon's Art. 8307, sec. 5 (part relevant), Appendix B, *infra*; Art. 8306, sec. 10 (part relevant), Appendix C, *infra*.

Statement

This Workmen's Compensation Suit was instituted by the Petitioner, Hardware Mutual Casualty Company, against the Respondent, Adam McIntyre, seeking to set

aside an award of the Industrial Accident Board of the State of Texas made in the claim filed by Respondent, Adam McIntyre. Petitioner alleged that there was jurisdiction in the trial court below because of diversity of citizenship in that Petitioner was a Wisconsin Corporation, and that Respondent was a citizen of Jefferson County, Texas; and Petitioner alleged further that the amount in controversy was in excess of the sum or value of $10,000.00, exclusive of interest and costs. (McIntyre R. 2-6). The award of the Industrial Accident Board in this case was made on the 20th day of June, 1960. (McIntyre R. 2). Petitioner, as plaintiff, filed its complaint in the trial court below on June 21, 1960. (McIntyre R. 2). Respondent, in DEFENDANT'S MOTION TO DISMISS FOR WANT OF JURISDICTION, by verified pleadings, denied that the amount in controversy before the Industrial Accident Board of the State of Texas in the claim by Respondent amounted to or exceeded $10,000.00. (McIntyre R. 6-10). On June 23, 1960, two days after Petitioner filed its complaint in the trial court below, Respondent filed suit against Petitioner as Defendant in the District Court of Jefferson County, Texas, alleging, among other things, that Petitioner was obligated to pay Respondent the sum of $27.00 per week for a period of 401 weeks, plus interest on all past due installments which Respondent was entitled to under the law; and Respondent in such suit sued for the additional sum of $2,000.00 for medical expenses. (McIntyre R. 13-14).

On July 13, 1960, the same day Respondent, as defendant, filed DEFENDANT'S MOTION TO DISMISS FOR WANT OF JURISDICTION, Respondent filed Defendant's Original Answer and Cross-Action, *subject* to his Motion to Dismiss for Want of Jurisdiction, seeking to

recover the sum of $27.00 per week for a period of 100 weeks, plus $21.00 per week for 300 weeks, or a total of $9,000.00. (McIntyre R. 17-22).

Petitioner filed "PLAINTIFF'S REPLY TO DEFENDANT'S COUNTERCLAIM" on July 15, 1960. (McIntyre R. 23-25).

On the 15th day of August, 1960, "DEFENDANT'S (RESPONDENT'S) MOTION TO DISMISS FOR WANT OF JURISDICTION" was heard by the trial court below and from the evidence presented at such hearing and from a full review of the contents of the full case on file the trial court found the following:

I.

"That the defendant and cross-plaintiff, Adam McIntyre, did not make claim on the injury made the basis of the above action before the Industrial Accident Board of the State of Texas for the sum of TEN THOUSAND ($10,000.00) DOLLARS *or more*. (emphasis added).

II.

That the defendant and cross-plaintiff, Adam McIntyre, *has not* filed *a claim or suit in the above case for a sum* amounting to TEN THOUSAND ($10,000.00) DOLLARS *or more*. (emphasis added).

Based on the above finding by the trial court the Defendant's (Respondent's) Motion to Dismiss for Want of Jurisdiction was sustained by the trial court and said cause of action filed by Petitioner was dismissed for want of jurisdiction. (McIntyre R. 25-26). The court renewed this order (and the findings of fact) on August 24, 1960. (McIntyre R. 35-37).

Argument

In a suit founded upon diversity of citizenship which is filed in Federal Court under the Texas Workmen's Compensation Law, the amount in controversy is the amount which the claim filed with the Industrial Accident Board show in dollars and cents or by statement of facts from which the amount can *definitely* be determined, and the suit should be filed in the court having jurisdiction of that amount.

The substantive law of the State of Texas is controlling in deciding the amount of the claim made before the Industrial Accident Board of the State of Texas in the claim filed by Respondent, Adam McIntyre. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.C.T. 817 (1937).

The substantive law of the State of Texas is:

> "When the claim filed with the board shows the amount claimed, in dollars and cents or by statement of facts from which the amount can *definitely* be determined and the award of the board is less in amount than that of the claim, the amount shown by the claim is the amount in controversy and the suit should be filed in the Court having jurisdiction of that amount." *Booth v. Texas Employer's Assn.*, 123 S.W. 2d 322, 331 (Tex. Comp. App. Opinion adopted by the Supreme Court, 1938).

When Petitioner, as Plaintiff, filed its complaint in the trial court below to set aside the award of the Industrial Accident Board in the claim filed by Respondent, Adam McIntyre, the Board's findings and award were totally abrogated. *Booth v. Texas Employers Insurance Association*,

supra.; *Liberty Mutual Insurance Company v. Horton* (5 Cir. 1960), 275 F. 2d 148.

The record in this case on appeal before this Honorable Court does not show that Respondent made claim before the Industrial Accident Board of the State of Texas for $10,000.00 or more and there is nothing before this court other than the mere allegations of appellant contained in the transcript upon which this court could make a finding of fact contrary to those findings of fact made by the trial court; and under such state of the record this court can not set aside, ignore or alter the findings of fact made by the trial court.

The only thing this court on appeal can consider in determining the amount in controversy in the suit filed by Petitioner in the trial court below is whether the amount of Respondent's claim before the Industrial Accident Board of the State of Texas amounted to $10,000.00 or more. There is nothing before this court on this appeal from which this Honorable Court can determine the amount of Appellee's claim before the Industrial Accident Board of the State of Texas or the findings of the trial court in its ORDERS SUSTAINING MOTION TO DISMISS AND DISMISSING CAUSE FOR WANT OF JURISDICTION, other than the mere allegations contained in Petitioner's (as Plaintiff) Complaint filed in the trial court below to set aside the award of the Industrial Accident Board of the State of Texas made in the claim filed by the Respondent, Adam McIntyre. (McIntyre R. 2-26). There is nothing in the record from which this Court could find that the trial court was in error in finding that the Respondent, Adam McIntyre, did not make claim on the injury made the basis of the action in the trial court before

the Industrial Accident Board of the State of Texas for the sum of $10,000.00 or more; and there is nothing in the record from which this Court could find that the trial court made an error in finding that Respondent, Adam McIntyre, did not file a claim or suit in the trial court below for a sum amounting to $10,000.00 or more. (McIntyre R. 2-26).

The findings of the Industrial Accident Board of the State of Texas in the claim filed by Respondent, Adam McIntyre are not in the transcript of record in this case on appeal and the evidence (or statement of facts) filed by Respondent, Adam McIntyre, before the Industrial Accident Board of the State of Texas is not before this court; nor is there any statement of facts before this court. The allegations contained in Petitioner's (as Plaintiff) Original Complaint filed in the trial court below concerning the amount in controversy amount to nothing because they were denied there by verified pleadings on the part of Respondent; and, also, Petitioner's pleadings show that Petitioner was not in good faith in alleging that the amount in controversy came within the jurisdiction of the trial court because Petitioner alleged that Respondent was on the 15th day of April, 1960, capable and able to do the same type of work as before his injuries and that Respondent so advised the Industrial Accident Board of the State of Texas as to such fact; and Petitioner further alleged that Respondent was not entitled to recover for compensation and denied that Respondent had any residual disability or any loss of earning power or any loss of wage earning capacity. (McIntyre R. 4-5). The fact that Petitioner filed an Answer to the Motion of Respondent To Dismiss For Want Of Jurisdiction; and

the fact that the Clerk certified that there was no denial filed by Respondent denying the facts alleged in Petitioner's Answer To the Motion of Respondent asserting lack of jurisdiction amounts to nothing because the facts concerning the question of the amount in controversy were put in issue when Respondent filed his Motion To Dismiss For Want Of Jurisdiction. There was no necessity for Respondent, under the law, to again file a pleading denying the matters that were already denied and put in issue by the filing of Respondent's Motion To Dismiss For Want Of Jurisdiction.

The burden is on Petitioner, since Petitioner has attacked the fact findings made by the trial court concerning the amount in controversy, to show that said fact findings by the trial court are clearly wrong; and said fact findings made by the trial court, concerning the amount in controversy before the Industrial Accident Board of the State of Texas, can not be set aside by this Court unless Petitioner can show this Court that said fact findings are clearly erroneous. *Dr. William Howard Hay Foundation v. Safety Harbor Sanatorium*, 145 F. 2d 661, certiorari denied 65 S. Ct. 1024, 324 U.S. 877, 89 L. Ed. 1429; *Federal Rules of Civil Procedure*, rule 52(a), 28 *U.S.C.A.*; *Grace Bros. v. C. I. R.*, 173 F. 2d 170. The fact findings made by the trial court below concerning the amount in controversy are presumptively correct, and in the absence of a proper record, which contains all of the evidence essential to enable this Honorable Court to determine the correctness or incorrectness of said challenged fact findings can not be questioned on review. *Public Service Commission of Puerto Rico v. Havemeyer*, 56 S. Ct. 360, 296 U.S. 506, 80 L. Ed. 392, rehearing denied

56 S. Ct. 496, 297 U.S. 727, 80 L. Ed. 1010; *Sublette v. Servel, Inc.*, 124 F. 2d 516.

The trial court's order sustaining Respondent's Motion to Dismiss For Want of Jurisdiction specifically states as *facts* the following:

> "BE IT REMEMBERED that on the 15th day of August, 1960, defendant's Motion to Dismiss for want of jurisdiction in the above cause *came on for hearing; and the court having heard said Motion* and the court having reviewed contents of the full case on file, the court is of the opinion and *finds* the following:" (Emphasis added) (Tr. 25).

The statement of facts by the trial court that said motion came on for hearing and that the Court heard said motion are statements of fact by the trial court and findings of fact by the trial court that a hearing was held; and it should not be presumed by this court on appeal that said statement and findings of fact by the trial court did not occur. *Dr. William Howard Hay Foundation v. Safety Harbor Sanatorium*, 145 F. 2d 661, certiorari denied 65 S. Ct. 1024, 324 U.S. 977, 89 L. Ed. 1429; *Federal Rules of Civil Procedure*, rule 52(a), 28 *U.S.C.A.*; *Grace Bros. v. C. I. R.*, 173 F. 2d 170; *Sublette v. Servel, Inc.*, 124 F. 2d 516.

The trial court did not make any error in reaching the conclusion that "The Fact that Defendant and Cross-Plaintiff filed a cause of action in the State Court of Jefferson County, Texas, for total and permanent disability", would not aid the plaintiff in interpreting the defendant and cross-plaintiff's claim before the Industrial Accident Board to be for total and permanent disability.

There is absolutely nothing in the record, or otherwise, before this court which can properly be considered by this court to show that the trial court made an error in concluding that the fact that Respondent filed a cause of action in the State Court of Jefferson County, Texas, for total and permanent disability would not aid the Petitioner in interpreting the Respondent's claim before the Industrial Accident Board to be for total and permanent disability. The fact that such cause of action was filed by Respondent in the State Court after Petitioner filed its complaint in the trial court below to set aside the award of the Industrial Accident Board in the claim filed by Respondent could not have been properly considered by the trial court because the question of the amount in controversy is decided by what claim Respondent filed with the Industrial Accident Board. *Booth v. Texas Employers Insurance Association, supra; Liberty Mutual Insurance Co. v. Horton, supra.*

The fact that Respondent filed suit in the District Court of Jefferson County, Texas, two (2) days after the filing of this Civil Action, to recover $12,827.00 for the same industrial injury made the subject of the suit in the trial court below is not an admission by respondent that the amount in controversy is $10,000.00 or in excess of $10,000.00, plus interests and costs.

The Petitioner filed its Complaint in the trial court below two (2) days *before* Respondent filed suit in the State Court. The filing of the suit by Respondent in the State Court could not be considered by the trial court below, nor can such fact be considered by this court, in determining the amount in controversy because the jurisdictional amount is to be judged as of the time the original

Complaint is filed in the trial court. *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 289, 58 S. Ct. 586, 82 L. Ed. 845; *Carr v. Fife*, 156 U.S. 494, 15 S. Ct. 427, 39 L. Ed. 508; *Anderson v. Watts*, 138 U.S. 694, 11 S. Ct. 449, 34 L. Ed. 1078; *National Surety Corporation v. Chamberlain*, 171 F. Supp. 591; *Cumberland v. Household Research Corp. of America, D. C. Mass.*, 145 F. Supp. 782.

Petitioner failed to meet its burden of proof of establishing that the District Court below had jurisdiction.

The burden of establishing federal jurisdiction is on him (Petitioner) who alleges it. *Buck v. Gallagher*, 307 U.S. 95, 59 S. Ct. 740, 83 L. Ed. 1128; *Gibbs v. Buck*, 307 U.S. 66, 59 S. Ct. 725, 83 L. Ed. 1111; *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 56 S. Ct. 780, 80 L. Ed. 1135.

The only thing Petitioner did to meet its burden was to file inconsistent pleadings in the trial court concerning the amount in controversy. See paragraphs I, IV and V of Plaintiff's (Petitioner's) Original Complaint and compare paragraphs VI, VII, VIII and the Prayer of said complaint.

The allegations in paragraph I, IV and V of Plaintiff's (Petitioner's) Original Complaint are mere allegations which were denied by verified pleadings filed by Respondent (McIntyre, R. 6-10). Such allegations and the *facts* arising therefrom were put in issue and the finding of *fact* by the trial court below are in favor of Respondent. (McIntyre, R. 25-26). Such findings of fact by the trial court must stand. Authorities cited *supra*.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Affidavit of Service

I, Joe H. Tonahill, of Counsel for Respondent, do hereby certify that service of a copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari has been made on Petitioner by mail in accordance with the Rules of this Court.

Dated this 7th day of September, 1962.

Joe H. Tonahill
Joe H. Tonahill
Of Counsel for Respondent

APPENDIX A

In The
UNITED STATES COURT OF APPEALS
For The Fifth Circuit

No. 18557

(R. McIntyre 44)

HARDWARE MUTUAL CASUALTY COMPANY,
Appellant

versus

ADAM McINTYRE, *Appellee*

Appeal from the United States District Court for the Eastern District of Texas

---

(June 20, 1962)

Before TUTTLE, Chief Judge, HUTCHESON and JONES, Circuit Judges.

TUTTLE, Chief Judge: The single question presented by this appeal is whether the District Court properly dismissed appellant's suit for want of jurisdiction on the ground that the matter in controversy, exclusive of interest and costs, did not exceed the sum of $10,000.00 as required by 28 U.S.C. §1332. For the reasons hereafter stated, we affirm the judgment of the District Court.

On January 15, 1960, the appellee, Adam McIntyre, a resident of Texas, was injured while working for his employer in Nome, Texas. The employer's compensation carrier under the Texas Workmen's Compensation Law was the appellant, Hardware Mutual Casualty Company, a Wisconsin corporation. On February 25, 1960, the appellee filed a claim with the Texas Industrial Accident Board in which he simply described the circumstances surrounding his injury did not request a specific amount of compensation.[1]

On June 20, 1960, the Board awarded the appellee compensation in the amount of $22.01 per week for 15 consecutive weeks commencing January 16, 1960, or a total of $330.15.

The very next day, the appellant filed this suit to "set aside" the award. The complaint alleged generally that the matter in controversy exceeded $10,000, and specifically, that:

> "The claim filed by the defendant for compensation with the Industrial Accident Board of Texas is for total and permanent incapacity . . . and although the claim for compensation is not set out with particularity [with respect to] the amount of money [claimed] . . . [the] amount fixed by law for compensation [for total and permanent incapacity] is a sum which is within the jurisdiction of this Court; . . ."

---

[1]Appellee's claim stated simply that "while he was jacking up a tractor, the jack leg fell, causing the tractor to fall on his left shoulder and right leg." On March 15, 1960, the appellee amended his claim to state the following: "I was taking a wheel off a tractor and it fell on me, breaking my left clavicle and injuring my left shoulder, back and side and causing general injuries to my body."

The source of appellant's dissatisfaction with the award is revealed in the following allegation of the complaint:

> "The plaintiff paid defendant compensation until on or about the 15th day of April, 1960, and suspended and stopped the payment of same because the claimant was then capable and able to do the same type of work as before his alleged injuries and plaintiff so advised the Industrial Accident Board of the State of Texas to such effect and plaintiff is now claiming and does claim that defendant is not entitled to recover for compensation from plaintiff or in the amount as shown and set forth in the above mentioned award of the Industrial Accident Board of Texas. The defendant has been paid for his temporary total incapacity and plaintiff denies that defendant has any residual disability or any loss of earning power or any loss of wage earning capacity."[2]

The complaint prayed for judgment "setting aside" the award and that the appellee "be denied any and all relief by way of compensation."

On July 13, 1960, the appellee moved to dismiss the complaint for want of jurisdiction, alleging that he did not claim "total and permanent incapacity" before the Board, that he did not claim compensation in excess of $10,000 before the Board, and that the amount in controversy thus did not exceed $10,000. On the same day, the appellee filed his answer to the complaint, which contained essentially the same allegations as were contained in his motion to dismiss. The answer further alleged that the appellee "sustained some total disability but that said total disability was not permanent." Also on July 13, 1960, the

[2] In other words, the appellant claims that the award gave the appellee $44.02 too much.

appellee filed a counterclaim against the appellant wherein he claimed total disability for 100 weeks and partial disability for another 300 weeks. The counterclaim prayed for judgment in the sum of $27 per week for 100 weeks and $21 per week for 300 weeks, or a total of $9,000.

Prior to July 13, 1960, and on June 23, 1960, the appellee had filed a civil action against the appellant in a Texas state court wherein he alleged total disability for 401 weeks. The complaint in the state court prayed for judgment in the sum of $27 per week for 401 weeks plus $2,000 medical expenses, or a total of $12,827.

On August 15, 1960, the District Court granted appellee's motion to dismiss on the grounds (1) that the appellee had not claimed compensation in excess of $10,000 before the Texas Industrial Accident Board and (2) that the appellee had not sought to recover a sum in excess of $10,000 in the instant suit.

Any analysis of the problem here involved must begin with an examination of the Supreme Court's recent decision in *Horton v. Liberty Mutual Insurance Co.*, 367 U.S. 348. That case, as this one, concerned a suit by an insurer to "set aside" an award of the Texas Industrial Accident Board. The award in that case was $1,050. The injured workman had claimed $14,035 before the Board, had instituted a suit in a state court for $14,035, and had counterclaimed in the federal action for $14,035. The Court upheld the jurisdiction of the district court in the following language:

> "We agree with petitioner that determination of the value of the matter in controversy for purposes of federal jurisdiction is a federal question to be decided under federal standards, although the federal

courts must, of course, look to state law to determine the nature and extent of the right to be enforced in a diversity case. It therefore is not controlling here that Texas has held the crucial factor for allocating its cases among different state courts on an amount-in-controversy basis is the amount originally claimed before its State Compensation Board . . .

"The general federal rule has long been to decide what the amount in controversy is from the complaint itself, unless it appears or is in some way shown that the amount stated in the complaint is not claimed "in good faith." In deciding this question of good faith we have said that it "must appear . . . a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal." The complaint of the respondent company filed in the District Court, while denying any liability at all and asking that the award of $1,050 against it be set aside, also alleges that petitioner Horton has claimed, now claims and will claim that he has suffered total and permanent disability and is entitled to a maximum recovery of $14,035, which, of course, is in excess of the $10,000 requisite to give a federal court jurisdiction of this controversy. *No denial of these allegations in the complaint has been made; no attempted disclaimer or surrender of any part of the original claim has been made by petitioner, and there has been no other showing, let alone a showing "to a legal certainty," of any lack of good faith on the part of the respondent in alleging that a $14,035 claim is in controversy.* It would contradict the whole record as well as the allegations of the complaint to say that this dispute involves only $1,050. The claim before the Board was $14,035; the state court suit of petitioner asked that much; the conditional counterclaim in the federal court claims the same amount. Texas law under which this claim was created and has its being leaves the entire $14,035

> claim open for adjudication in a *de novo* court trial, regardless of the award. Thus the record before us shows beyond a doubt that the award is challenged by both parties and is binding on neither; that petitioner claims more than $10,000 from the respondent and the respondent denies it should have to pay petitioner anything at all. No matter which party brings it into court, the controversy remain the same; it involves the same amount of money and is to be adjudicated and determined under the same rules. Unquestionably, therefore, the amount in controversy is in excess of $10,000." (Emphasis added)

One thing appears clearly from the foregoing language; and that is, that the amount of the award does not fix the amount in controversy between the parties when the insurer brings suit to "set aside" the award. This is because the mere filing of suit by the insurer absolutely nullifies the award, so that its amount can never be said to be "in controversy" in the action. Indeed, the mere mention of the nature or amount of the award during the trial has been held to be prejudicial error by the Texas Courts. *Fidelity Union Casualty Co. v. Klatt*, 47 S.W. 2d 417.

We interpret Horton to prescribe the following test for determining whether federal jurisdiction exists when an insurer brings suit to "set aside" an award of the Texas Industrial Accident Board: If the insurer alleges that the insured has claimed compensation in excess of $10,000 before the Board and that the insured will claim compensation in excess of $10,000 in the court action to "set aside" the award, federal jurisdiction exists *unless* the insured denies the allegation that he will seek more than $10,000 in the court action and makes an affirmative claim for compensation for a sum which does not exceed $10,000.

We realized of course, that such a rule gives the insured the power to defeat federal jurisdiction simply by asserting a claim for less than $10,000 after he is brought into court by the insurer. But, however much this may depart from traditional notions of pleading federal jurisdiction, the procedure for "setting aside" an award established by the Texas Compensation Law leaves no satisfactory alternative. The Texas Compensation Law permits any interested party, including, of course, the insurer, to bring suit to "set aside" the award of the Industrial Accident Board. As noted previously, however, once such an action is commenced, the award becomes an absolute nullity under the Texas statute. The filing of the suit, in and of itself, abrogated the award, and this is so even if a voluntary nonsuit is taken and the case dismissed without judgment on the merits. See *Zurich General Accident Co. v. Rodgers*, 97 S.W. 2d 674; *Texas Reciprocal Ins. Ass'n. v. Leger*, 97 S.W. 2d 677. The insurer is under no obligation to prove that the award was erroneous, even though the insurer's action is designated as an action to "set aside" the award. To the contrary, once an action such as this is filed, a trial *de novo* is conducted, and the burden is on the *insured* (here, the defendant) to plead and prove whether and to what extent he is entitled to compensation. Thus, when the insurer institutes such an action, it is a "plaintiff" in name only. The filing of suit by the insurer is nothing more than a notice to the insured to come into court and prove his claim.

Thus it is that the amount actually in controversy in the action cannot be determined until the insured responds to this notice by filing a claim for compensation against the insurer. The insured's "counterclaim" is, for all intents and purposes, the *only* claim involved in the action.

If the insured asserts a claim for compensation for a sum which does not exceed $10,000, it then becomes clear to a legal and mathematical certainty that the amount in controversy is less than the jurisdictional requisite. Under no circumstances can the insured recover more than $10,000 in the suit. This being so, there is no federal jurisdiction.

The appellant argues that the amount in controversy can best be determined by looking to the amount claimed by the insured before the Industrial Board. For one thing, it does not appear that the test suggested by the appellant was adopted by the Supreme Court in Horton. For another, assuming the question was an open one, we think the rule proposed by the appellant has little to recommend it.

In Horton, the Supreme Court specifically noted that we are not bound by the Texas rule which, in certain cases, provides that the amount in controversy is fixed by the amount claimed by the insured before the Industrial Accident Board. After so noting, the Court did not say that we should adopt this rule as a matter of Federal law. Rather, the Court went to some lengths to point out that the insurer in that case had alleged that the insured had claimed and *would claim* in excess of $10,000, and that the insured had made "no denial of these allegations." If the Court had meant to adopt the test urged by the appellant here, it could have done so in plain and simple language. In that event, we think, the opinion would not have emphasized, as it did, that the *insured* was vigorously asserting a claim for compensation for a sum exceeding the jurisdictional amount. In short, we do not think that the majority opinion in Horton is fairly susceptible to the interpretation which the appellant places upon it.

Moreover, it seems to us that the rule proposed by the appellant has at least two serious shortcomings. First of all, the Texas Compensation Law does not require an insured to claim a specific sum of money before the Industrial Accident Board; nor does it even require him to state sufficient facts from which the amount claimed can definitely be determined. *Booth v. Texas Employers' Ins. Ass'n*, 123 S.W. 2d 322. Thus, if the rule suggested by the appellant was adopted, it would be impossible to fix the amount in controversy in a case where the insured did not claim a specific sum before the Board and did not state sufficient facts from which the amount claimed could be determined. Since the latter situation is apparently of common occurrence, appellant's suggested test would have rather limited utility.

Secondly, the Texas law is clear that the insured is not ordinarily bound by the amount which he claims before the Board. Where, as here, the claim is for general injuries suffered, the insured, in a court action to "set aside" the award, can increase the amount of his claim to include compensation for all injuries proximately resulting from the accident. *Booth v. Texas Employers' Ins. Assn., supra.* Similarly the insured can reduce the amount of his claim if he sees fit to do so. Thus, the amount of the claim before the Board is hardly a reliable indicator of the amount actually in controversy in the federal court action.

The appellant contends that it would be unfair to permit the insured to defeat federal jurisdiction by claiming less than the jurisdictional amount in the action, since the insured would then be free to assert a claim for more than $10,000 in a state court action and the insurer would be unable to remove to a federal court because of the Congressional ban on the removal of state workman's com-

pensation cases. See 28 U.S.C. §1322. Of course, the simple answer to this is that, regardless of any possible unfairness a federal court does not have jurisdiction in a diversity case unless the amount is controversy exceeds the sum of $10,000. Appellant's argument would be equally applicable, and equally unavailing, in numerous other cases where the amount in controversy does not reach the federal standard. For example, suppose a plaintiff brought suit against a defendant for $5,000 and alleged that the defendant had a compulsory counterclaim against the plaintiff for $15,000. Certainly, the defendant would be entitled to have the case dismissed for want of jurisdiction, even though the defendant could then bring suit for $15,000 in a state court and the case could not be removed because the suit was commenced in the original plaintiff's home district. However real the possibility of losing an opportunity to have the case tried in a federal court, it cannot vitiate the fact that the amount in controversy in an action such as the instant one is the amount claimed by the insured in the action and that, where the amount there claimed does not exceed $10,000, the federal standard has not been met. We might note, on the other hand, that if an insured subsequenly sues in a state court for more than $10,000, he would probably have some difficulty overcoming the effect of his previous judicial admission that he was not entitled to more than $10,000. This may well afford all the protection the insurer needs.

In the present case, it appears that the appellee did not claim more than $10,000 before the Industrial Accident Board and that he counterclaimed for $9000 in the action commenced by appellant. The District Court, in a decision rendered before the Supreme Court's decision in Horton,

dismissed the appellant's action on both the above grounds. For the reasons heretofore stated, we think dismissal was justified on the sole ground that the appellee's claim in the action was for less than $10,001. The judgment is, therefore,

AFFIRMED.

HUTCHESON, Circuit Judge, Dissenting:

I would simply "reverse on the authority of the Horton cases." As I read these cases, which are controlling here, it is quite plain that Judge Fisher's holding in this case, that federal jurisdiction did not exist, is not supported by the holding in those cases, that the claim of the insurance carrier determines federal jurisdiction unless the amount in controversy stated by it is found to a legal certainty to be not stated in good faith. Judge Fisher's finding in this case that, though the plaintiff sued in the state court for $12,827, he could, by limiting his counterclaim in federal court to $9.000, defeat the jurisdiction as asserted in the insurer's suit, in my opinion, goes directly counter to the holding of the Horton cases, and his judgment must be reversed, for affirmed.

I respectfully DISSENT from the opinion of the majority.

A true copy
Test:

EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals,
Fifth Circuit
New Orleans, Louisiana
By CLAIR R. JAMES
Dy. Clerk

(Seal)

Aug 2 1962

JUDGMENT.

Extract from the Minutes of June 20, 1962

No. 18557

(R. McIntyre 56)

HARDWARE MUTUAL CASUALTY COMPANY

versus

ADAM McINTYRE

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, Hardware Mutual Casualty Company be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

"Hutcheson, Circuit Judge, Dissents."

* * *

APPENDIX B

No. 4327

(R. McIntyre 25)

In The
DISTRICT COURT OF THE UNITED STATES
For the Eastern District of Texas, Beaumont Division

HARDWARE MUTUAL CASUALTY COMPANY

v.

ADAM McINTYRE

ORDER SUSTAINING MOTION TO DISMISS AND DISMISSING CAUSE FOR WANT OF JURISDICTION

BE IT REMEMBERED that on the 15th day of August, 1960, defendant's Motion to Dismiss for want of Jurisdiction in the above cause came on for hearing; and the court having heard said Motion and the court having reviewed contents of the full case on file, the court is of the opinion and finds the following:

I.

That defendant and cross-plaintiff, Adam McIntyre, did not make claim on the injury made the basis of the above action before the Industrial Accident Board of the

State of Texas for the sum of TEN THOUSAND $(10,000) DOLLARS or more.

II.

That the defendant and cross-plaintiff, Adam McIntyre, has not filed a claim or suit in the above case for a sum amounting to TEN THOUSAND ($10,000) DOLLARS or more.

III.

That the Motion filed by defendant and cross-plaintiff, Adam McIntyre, for dismissal of the above cause for want of jurisdiction in this Court should be and is hereby sustained.

IT IS ACCORDINGLY ORDERED, ADJUDGED, and DECREED by the court that Motion filed herein by defendant and cross-plaintiff, Adam McIntyre, for dismissal of the above cause for want of jurisdiction of this Court is sustained and said cause of action is hereby dismissed for want of jurisdiction.

To which Order and Ruling of the Court the plaintiff, Hardware Mutual Casualty Company, duly and timely excepted in open court and gave notice of appeal to the 5th Circuit Court of Appeals.

ENTERED AND SIGNED this 15th day of August, 1960.

Original Signed by

JOE J. FISHER
United States District Judge

APPENDIX C

No. 4327

(R. McIntyre 33)

In The

DISTRICT COURT OF THE UNITED STATES

For the Eastern District of Texas, Beaumont Division

HARDWARE MUTUAL CASUALTY COMPANY

v.

ADAM McINTYRE

MEMORANDUM DECISION

The plaintiff, Hardware Mutual Casualty Company, a Wisconsin corporation, instituted this suit on June 21st, 1960, against the defendant, Adam McIntyre, a resident and citizen of Jefferson County, Texas, seeking to set aside an award of the Industrial Accident Board of the State of Texas, made by the Board on June 20th, 1960, ordering the plaintiff to pay to defendant, workmen's compensation benefits under the Workmen's Compensation Law of the State of Texas, of $22.01 per week for fifteen weeks beginning January 16, 1960, for injuries received which resulted in incapacity to labor. Plaintiff alleges in its original complaint, paragraph 4, that defendant filed a claim with the Industrial Accident Board of the State of Texas, alleging an injury, which was general, total

and permanent; the defendant denies that the claim filed with the Industrial Accident Board of the State of Texas was based on an allegation of total and permanent disability, but that his claim was for a general injury, without any reference to the general injury being total and permanent. Based on said allegations of the defendant in his claim filed before the Industrial Accident Board of the State of Texas, and the diversity of citizenship that exists between plaintiff and defendant, defendant asserts jurisdiction of this Court in this cause under the provisions of 28, U.S.C.A., 1332, as amended.

On July 13, 1960 the defendant filed a motion to dismiss the cause for want of jurisdiction, alleging that the defendant, Adam McIntyre, did not file a claim before the Industrial Accident Board of the State of Texas for total and permanent disability, and that said allegation on the part of the plaintiff is false, and made for the purpose of conferring jurisdiction on the United States District Court. On the same day defendant filed a cross-action against plaintiff, subject to his motion to dismiss, in which cross complaint he sought to recover from the plaintiff workmen's compensation benefits because of incapacity to labor he claims he suffered as the result of his injury on or about January 15, 1960, for one hundred weeks of total disability at the rate of $35.00 per week, to be followed by three hundred weeks of partial disability at the rate of $21.00 per week, or for the aggregate sum of $9,000.00.

It further appears from the pleadings that defendant and cross-plaintiff, Adam McIntyre's, claim before the Industrial Accident Board of the State of Texas did not make a specific claim for total and permanent disability as a result of said injury, but claimed only general injuries

to his body without any attempt to estimate the extent and duration of said injuries. Further, plaintiff's reply to the defendant's motion to dismiss, discloses that on June 23, 1960, three days after the Industrial Accident Board Award, and two days after the plaintiff had filed its complaint in this Court, the defendant and cross plaintiff filed a suit in the District Court of Jefferson County, Texas, alleging that said injuries resulted in total and permanent disability.

The plaintiff cites in support of its motion to dismiss for want of jurisdiction, the landmark case of *Booth v. Texas Employers' Ins. Ass'n.*, 123 S.W. 2d 322, and the recent case decided by the Fifth Circuit, *Liberty Mutual Ins. Co. v. Horton*, 275 Fed. 2d 148:

The court recognizes the authorities cited as being the law on the point, that jurisdictional amount is determined by the claim made before the Industrial Accident Board of the State of Texas, and it is the Court's opinion that this case does not present a similar fact situation, because the defendant and cross plaintiff did not claim or contend for compensation in the amount of $10,000.00 or more in his claim filed before the Industrial Accident Board of the State of Texas.

The fact that defendant and cross plaintiff filed a cause of action in the State Court of Jefferson County, Texas, for total and permanent disability will not aid the plaintiff in interpreting the defendant and cross-plaintiff's claim before the Industrial Accident Board to be for total and permanent disability because said suit was admittedly filed three days after the Industrial Accident Board's Award, and two days subsequent to the plaintiff's complaint filed in this Court.

This Court concludes that it does not have jurisdiction of this case, because the amount in controversy does not exceed the sum of $10,000.00, exclusive of interest and costs.

Defendant's motion to dismiss for want of jurisdiction will be sustained.

ENTERED this the 24th day of August, A. D. 1960.

(Signed) JOE J. FISHER
United States District Judge